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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MELISSA ESCOBAR, Defendant and Appellant.	B260324 (Los Angeles County Super. Ct. No. MA052889)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. Laforteza, Judge. Affirmed.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising

Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Melissa Escobar appeals from the judgment entered following a jury trial in which she was convicted of first degree murder. Defendant contends the evidence was insufficient to support her conviction, the trial court violated her due process rights by allowing the prosecution to present her convicted former codefendant to the jury to demonstrate his refusal to testify, and the trial court erred by failing to instruct sua sponte on voluntary manslaughter. We affirm.

BACKGROUND

Defendant was previously tried with codefendant Ryan Perez by a single jury and both were convicted. On appeal, this court affirmed Perez's conviction but reversed defendant's conviction for improper coercion of the jury by the trial court. (*People v. Perez and Escobar* (Oct. 25, 2013, B240406 [nonpub. opn.]).) Defendant was retried, again convicted, and now appeals from that judgment of conviction.

On the evening of April 19, 2011 (undesignated date references pertain to 2011), Miguel Villa's body was found by a man on horseback in the desert in Lancaster. Bloody drag marks led from the body to a set of tire tracks, and two sets of footprints—one larger and the other smaller—accompanied the drag marks. Villa had suffered multiple blunt force injuries to the head, which caused his death. There were injuries to the forehead, left eye, cheek, and top of the head that could have been inflicted with either a fist or a blunt weapon, but an eight-inch area of lacerations and numerous intersecting fractures extending over the top of the head and from the left ear to the

back of the head would have required the use of a weapon, not just a bare hand. The deputy medical examiner identified at least nine or ten blows in the latter area and testified these were consistent with Villa being struck while lying on the ground. The deputy medical examiner also testified he would have expected more bleeding from Villa's wounds than the blood visible in photographs of the area in which Villa's body was found. A bruise on the back of Villa's right hand appeared to be a defensive wound.

Villa was identified through fingerprinting. A search of Villa's residence and statements by his housemates led the police to defendant, Villa's former girlfriend. Villa was partially paralyzed on his left side from an old gunshot wound to his neck.[1] He limped, could not move his left arm, and required assistance with hygiene, dressing, cooking, and other household tasks. Mario Pinon, one of his housemates, served as a paid caregiver, but Villa told Pinon that defendant wanted the job.

Surveillance of defendant's home by sheriff's deputies led to the identification of Perez, with whom defendant commenced a tumultuous romantic relationship on December 31, 2010. On one occasion about two months before Villa's death, Perez answered defendant's phone when Villa called. Perez called Villa "bitch" and told him not to call again. Later the same day, defendant drove Perez to Villa's home in Highland, in San Bernardino County. Villa went out to defendant's car and asked Perez if he

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[1] During the autopsy a bullet was recovered from Villa's neck. The deputy medical examiner testified this was an old wound, consistent with paralysis on one side, and would probably have affected Villa's mobility.

still had a problem. Perez did not say anything or get out of the car. Villa told Perez to get out, then asked why they had come to his house if Perez was not going to do anything.

On April 18 Villa spent part of the day with defendant, then returned home and socialized with Pinon until midnight, when Pinon went to bed. Pinon never saw Villa again. Defendant was supposed to pick Villa up on April 19 to take him to the DMV, but she never came by to pick him up or to look for him.

On the night of April 18, defendant phoned Jose Medina, the father of her son Isaac, and asked him to pick up Isaac after he got off work. Medina agreed. When he arrived at defendant's house late on April 18 or early on April 19, Perez and defendant were there and seemed as if they were in a hurry to leave. Defendant repeatedly told Medina to " 'hurry up.' "[2]

Sometime between 1:45 and 2:00 or 3:00 a.m. on April 19,[3] Aaron Hoover, another of Villa's housemates, was entering the house at the same time Villa was leaving. Villa was speaking on a mobile phone in a friendly manner, as if he were talking to someone he knew. Villa did not sound angry. The house door closed, then a car door closed, and a car drove away. Hoover

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[2] Although Medina had both given detectives a statement to this effect and testified in accordance with his statement at the first trial, he testified at the retrial that his prior testimony and statement were not true. A recording of his interview with detectives was played at the retrial.

[3] Hoover insisted that the date was April 18 and it was a Tuesday. April 18 was a Monday and April 19 a Tuesday. He was certain, however, that he saw Villa leave the house the night he was killed.

never saw Villa again. The next day he learned Villa was missing.

Detectives obtained call data records for the mobile phones of defendant, Perez, and Villa, which revealed that calls were made from Perez's phone to defendant's phone at 11:04, 11:23, and 11:28 p.m. on April 18. At 1:31 a.m. on April 19 a 32-second call made from Perez's phone to defendant's phone registered initially on a tower located at Forest Falls then ended on a tower closer to defendant's home. Two calls with blocked caller identification were made to Villa's phone using Perez's phone at 1:47 a.m. and 1:49 a.m. on April 19. The second of those calls lasted 14 minutes. Both calls began near defendant's home, but the latter call ended near Villa's home.

Blood producing a DNA profile that matched Villa's was found in the trunk and elsewhere in defendant's car. However, the trunk of the car was very clean and the blood was found only in a few places: on a speaker, inside the trunk latch, and in the well for the spare tire. The lead detective testified that he would have expected much more blood in the trunk if Villa's body had been put directly in there without the trunk being covered. Given the nature of the fabric lining the trunk, cleaning would not have been completely effective.

Investigators seized defendant's mobile phone for analysis and found silver-colored brass knuckles in her bedroom closet.[4] Pinon testified defendant had once shown him two sets of brass

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[4] Investigators also found a pair of Vans tennis shoes in defendant's closet and seized them, but the lead detective testified he did not believe they were the shoes that made the impressions at the scene where Villa's body was found because there was no blood or dirt on them. However, the tread pattern and size matched the set of smaller footprints at the scene.

knuckles in the center console of her car. One set was black and the other was the one in evidence. Investigators never found the black brass knuckles.

At Perez's house, investigators seized one mobile phone from Perez's pocket and another from his bedroom. They found Villa's phone atop a storage container on a high shelf in the garage. Perez denied any knowledge of the phone in the garage, but DNA found on the phone beneath its protective case was consistent with Perez, but not defendant or Villa. DNA on the phone battery was a mixture of at least three contributors and was consistent with Perez, defendant, and Villa.

Medina told investigators about one week after defendant's house was searched that defendant had told him she was in "really, really bad" trouble and was going to be locked up for many years because she and Perez had killed Villa. Defendant told him that Villa had previously hit her and left a mark on her face. Perez asked her about it repeatedly, and she eventually told him that Villa had hit her. Perez became angry, and they went to confront Villa and killed him.[5]

Defendant testified that Villa did not walk with a limp and, although Villa's left arm was somewhat impaired, he could move it and grip things with his left hand. Defendant claimed Villa faked his disabilities to continue receiving money for in-home care.

Defendant testified that Perez was jealous, controlling, and verbally abusive. He told her he had followed her on two

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[5] At the retrial Medina testified he also made up that statement.

occasions and on another occasion she "caught him," but he denied following her.[6] Perez was jealous of Villa and Medina.

Defendant testified that she and Perez had argued April 17 and 18 and she had broken off their relationship. They sent one another numerous angry text messages that were introduced in evidence at trial. Defendant had lunch with Villa on April 18 and they planned to go out that night if defendant could find a baby-sitter. Medina agreed to pick up Isaac and arrived at defendant's home between 11:00 p.m. and midnight. Defendant denied that Perez was present and suggested Medina confused that night with other occasions when Perez was present. Defendant picked up Villa at his house at around 12:30 a.m. and they drove to a nearby park so Villa could finish his beer. Defendant then drove to Forest Falls, which was about a 35-minute drive from Villa's home. She turned off the main road and parked at an isolated location on a smaller dirt road that she had visited many times with Perez and occasionally with Villa. Defendant had previously told Perez she had been here with Villa. Neither defendant nor Villa spoke to anyone on the phone while they were together that night.

Defendant testified that Villa leaned against the hood of her car and she stood in front of him, listening to music and talking. Carrying a baseball bat, Perez walked up to them.

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[6] On cross-examination, defendant testified Perez followed her "all the time" and was impeached with her failure to testify in the first trial that Perez sometimes followed her, as well as her testimony at the first trial that she did not see Perez following her as she drove to Villa's house, to the park, and then to Forest Falls, and, further, she "wouldn't see why [Perez] would be following [her]."

Defendant later learned Perez had parked "at the bottom" of the road. She did not know Perez was going to be there. Perez said, " 'You should have just told me, you should have told me.' " Villa got off the car hood, laughed, and began saying things to Perez. Perez and Villa argued. Villa took out and opened a folding knife and walked toward Perez. Perez then hit Villa repeatedly with the bat as they faced one another. Villa swung at Perez while holding the knife, but dropped the knife just before he fell to the ground.[7] Defendant picked up the knife and threw it in her car. Defendant denied Perez continued to strike Villa after he fell to the ground. Villa's head was split open, and defendant believed he was dead. She did not want to leave Villa's body there, so Perez put it in the trunk of her car before walking back to his own car. He did not wrap the body in anything.

Defendant testified that she and Perez drove away separately, but both pulled over part way down the hill. Defendant showed Perez Villa's knife. Perez took it from her and "took off running somewhere." After Perez returned to his car, defendant followed him to his home, where they attempted to wash the blood off of defendant's car. Perez then got into defendant's car and told her to drive. Perez screamed at defendant and gave her driving directions during their entire drive. They ended up in the desert, but she only learned it was Lancaster through testimony in the criminal proceedings.[8] Perez

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[7] On redirect examination defendant testified she thought Villa dropped his knife after Perez struck him the first time, then Villa advanced toward Perez.

[8] On cross-examination defendant was impeached with her prior testimony that she and Perez did not talk while en route

removed Villa's body from the trunk of defendant's car and dragged it into the desert. Perez yelled at defendant to join him, which she did briefly, but she did not help move Villa's body. Perez was yelling at defendant and she feared he might hit her, so she ran back to her car. When Perez returned he told defendant to drive to his house.

Defendant testified that upon their arrival at Perez's house, he took her clothing and the Vans shoes she had been wearing and gave her some of his sister's clothing to wear. Defendant did not do anything with Villa's phone, which had been in a cup holder in her car.

In defendant's retrial, the jury again convicted her of first degree murder. The court sentenced her to a term of 25 years to life in prison.

DISCUSSION

1. Sufficiency of evidence

The prosecution tried defendant on the theory she aided and abetted Perez in the first degree premeditated murder of Villa. Defendant contends there was no evidence supporting this theory, only "raw, completely un-baked conjecture and speculation." We disagree.

a. Pertinent legal principles

We review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) Substantial evidence is " ' "evidence that is reasonable, credible,

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and she went to Lancaster because she "figured there is empty deserts there."

and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*Id*. at pp. 1006–1007.)

We presume the existence of every fact supporting the judgment that the jury could reasonably have deduced from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) A reasonable inference may not be based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guess work. (*People v. Raley* (1992) 2 Cal.4th 870, 891.) " ' "A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." ' " (*Ibid.*)

A person aids and abets the commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing, facilitating or encouraging commission of the crime, by act or advice, aids, promotes, encourages, or instigates the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) The jury may consider facts such as presence at the scene of the crime, and companionship and conduct before and after the offense, including flight, in deciding whether a defendant knew of the perpetrator's intentions and intended to facilitate or encourage the crime. (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.)

b. Substantial evidence supports defendant's conviction

Viewing the whole record in the light most favorable to the judgment, we conclude substantial evidence supports defendant's conviction. First, defendant admitted participating in killing Villa. Medina told investigators that defendant had told him, she

and Perez had killed Villa after they went to confront him about hitting defendant and leaving a mark on her face.

Second, the evidence and reasonable inferences therefrom supported the prosecutor's aiding and abetting theory. According to Medina's prior testimony and statement to police, Perez was at defendant's home on the night of April 18 or early morning of April 19 when Medina arrived to pick up his son, and Perez and defendant seemed to be in such a hurry to leave that defendant repeatedly urged Medina to hurry up. Although Perez did not have a friendly relationship with Villa, calls with the originating phone number blocked were made from Perez's phone to Villa's phone at 1:47 a.m. and 1:49 a.m. on April 19, with the second call lasting 14 minutes. Although defendant suggests Perez actually made the calls, it was unlikely Villa and Perez engaged in a 14-minute call with one another. Moreover, both calls originated from near defendant's house, but the longer call ended near Villa's house. This evidence, combined with Hoover's testimony about seeing Villa on the phone in what appeared to be a friendly call as Villa left the house somewhere between 1:45 a.m. and 2:00 a.m. on the last night he was seen alive, support a strong inference that defendant, not Perez, made these calls and spoke to Villa. This was inconsistent with and thus diminished the credibility of defendant's testimony that she picked Villa up at his house around 12:30 a.m. and that neither she nor Villa used their phones while they were together that night. It also undermined her testimony that she had broken up with Perez on April 18 and that he texted and phoned her throughout the day, given that she never mentioned she had somehow acquired his phone in the early morning hours of April 19. Finally, the small quantity of blood in the trunk of defendant's car and the nature of the trunk lining supported a strong inference that someone either prepared

the trunk of her car in advance by lining it with a nonabsorbent sheet or brought such a sheet with him or her to wrap the body.

In addition, although defendant claimed for the first time in this trial that Perez often followed her, she was impeached with her testimony from the first trial that she did not see Perez following her as she drove to Villa's house, to the park (where they parked and remained for a time), and then to Forest Falls; her prior testimony that she "wouldn't see why [Perez] would be following [her]"; and her failure to testify in the first trial that Perez followed her sometimes or "all the time." If Perez were not following her and there was no prearrangement to go to Forest Falls, it was a remarkable coincidence that Perez arrived there soon after defendant and Villa did and that he knew they were there, given defendant's testimony that Perez was parked down "at the bottom" of the road leading up into the mountainous area. Phone records suggested Perez may have visited Forest Falls and phoned defendant as he was returning to her house at 1:31 a.m.

Defendant's credibility was also diminished by the contradiction between her testimony that Perez alone dragged Villa's body to its resting place in the desert and the physical evidence of two sets of footprints all along the drag tracks from the tire prints to the body. Defendant's testimony that she simply followed Perez's directions, he was screaming at her, and she did not even know that the site where they left Villa's body was in Lancaster was impeached with her prior testimony that neither she nor Perez talked during their drive to Lancaster and that she had driven to Lancaster because she "figured there is empty deserts there."

Collectively, substantial evidence strongly supported a reasonable inference that Perez and defendant planned to kill Villa, either reunited or faked their break-up on April 18, and

defendant enticed Villa to go out with her that night, then took him to a prearranged location where Perez arrived and beat Villa to death. Accordingly, sufficient evidence supports defendant's conviction.

2. Presenting Perez to the jury to demonstrate his refusal to testify

Outside the presence of the jury, Perez informed the court he would assert his Fifth Amendment privilege not to testify even if the court found the privilege did not apply and ordered him to testify. Defense counsel objected to having him to refuse to answer questions in the presence of the jury on the ground it would create undue prejudice to defendant. The prosecutor noted that because Perez's conviction had been affirmed and the California Supreme Court had denied his petition for review, his Fifth Amendment privilege with respect to Villa's murder no longer existed. The trial court agreed and also rejected defendant's objection pursuant to Evidence Code section 352.

The prosecutor called Perez, who refused to answer the prosecutor's questions even though the trial court, in the jury's presence, informed him that he had no Fifth Amendment privilege, ordered him to answer the prosecutor's questions, and threatened to hold him in contempt if he refused to answer questions. Perez answered defense counsel's questions, however. He testified his refusal to answer questions was not an attempt to help defendant, but was instead based upon his belief that he was convicted because "they" "turned things" he had previously said "around on" him and he was "still fighting [his] case." On redirect, Perez responded, "The truth has been spoken," but refused to elaborate. The prosecutor then offered Perez use immunity. After discussing the matter with counsel outside the

presence of the jury, the court appointed an attorney for Perez and the prosecutor called a different witness.

When Perez again returned to the witness stand, the court stated (in the presence of the jury) that the prosecutor had prepared a document granting Perez use immunity, the court had appointed an attorney for Perez, and Perez's testimony would be immunized and could not be used against him. Perez still refused to answer the prosecutor's questions, but stated, "[Y]ou've heard the truth" and "I'm scared to say anything." On recross-examination he was more talkative and agreed with defense counsel's suggestions that his prior statements had been misconstrued and that defendant had told the truth when she testified at the first trial. Perez also agreed that he did not want to answer questions because he feared his answers would be "perverted" to hurt himself and defendant, he acted in self-defense, and defendant neither knew nor had anything to do with killing Villa.

Citing *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), defendant contends that allowing Perez to refuse to testify in the presence of the jury violated the confrontation clause. She further contends her right to due process was violated by the combination of this conduct and the prosecution's argument to the jury that Perez's refusal to testify was intended to avoid incriminating defendant.

a. Pertinent legal principles

Introduction of a nontestifying codefendant's extrajudicial statement that implicates a defendant violates the defendant's federal constitutional right of confrontation, even if the jury is instructed to consider the statement only with respect to the codefendant who made it. (*Bruton*, *supra*, 391 U.S. at p. 137.)

With respect to testimonial evidence, such as police interrogations or testimony from grand jury proceedings, a preliminary hearing, or a former trial, the confrontation clause demands both unavailability of the witness and a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at p. 68.) Otherwise, such testimonial hearsay is inadmissible.

"When a 'court determines a witness has a valid Fifth Amendment right not to testify, it is . . . improper to require him [or her] to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation. An adverse inference, damaging to the defense, may be drawn by jurors despite the possibility the assertion of privilege may be based upon reasons unrelated to guilt. . . . But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony.' " (*People v. Morgain* (2009) 177 Cal.App.4th 454, 466 (*Morgain*).)

A defendant's privilege against self-incrimination continues until his or her conviction becomes final, i.e., he or she has exhausted appeals or the time to appeal has passed. (*People v. Robert E.* (2000) 77 Cal.App.4th 557, 560; *Mitchell v. United States* (1999) 526 U.S. 314, 326.) "And where a witness receives immunity, that witness's testimony is compelled and the witness no longer has a privilege against self-incrimination." (*Morgain*, *supra*, 177 Cal.App.4th at p. 466.)

b. The trial court did not violate defendant's confrontation or due process rights.

First, we note that defendant's reliance upon *Bruton* and *Crawford* is misplaced. Neither an extrajudicial statement by Perez implicating defendant nor testimonial hearsay was

introduced. Moreover, to the extent Perez answered questions, his testimony was exculpatory with respect to defendant.

As the trial court noted, Perez's conviction was affirmed on appeal. His petition for review by the California Supreme Court was denied on January 21, 2014 (S214851). Thus, his conviction was final when he was called to testify on September 19, 2014. Later the same day, the prosecutor granted him use immunity. For both of these reasons, he no longer had a privilege against self-incrimination. It was therefore entirely permissible for the prosecutor to call Perez in the presence of the jury, for the court to order him to testify, and for the prosecutor to argue that Perez refused to testify to avoid incriminating defendant. This violated neither defendant's confrontation nor due process rights. (*Morgain*, *supra*, 177 Cal.App.4th at pp. 467–468.)

3. Sua sponte instruction upon voluntary manslaughter

Defendant contends that the trial court erred by failing to instruct, sua sponte, upon voluntary manslaughter as a lesser included offense. She argues that the evidence supported instruction upon both sudden quarrel/heat of passion and unreasonable self-defense theories for voluntary manslaughter.

a. Pertinent legal principles

A trial court must instruct sua sponte on a lesser included offense if there is substantial evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. (*People v. Souza* (2012) 54 Cal.4th 90, 115–116.) Substantial evidence in this context is "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Id.* at p. 116.) The substantial evidence requirement is not satisfied by any evidence, no matter how weak. (*Ibid.*)

Voluntary manslaughter consists of an unlawful killing upon sudden quarrel or heat of passion or in an actual, but unreasonable, belief in the need to defend against imminent death or great bodily injury. (Pen. Code, § 192, subd. (a); *People v. Bryant* (2013) 56 Cal.4th 959, 969.)

"Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' ([Pen. Code,] § 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 (*Carasi*).) "[T]he passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

Heat of passion has both objective and subjective components. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) To satisfy the objective component, the claimed provocation must be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, from passion rather than from judgment. (*Id.* at p. 550; *Carasi*, *supra*, 44 Cal.4th at p. 1306.) "To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react,* without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene." (*People v. Beltran* (2013) 56 Cal.4th 935, 949 (*Beltran*).) " 'The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' " (*Moye*, at pp. 549–550.) A defendant may not " ' "set up his own standard of conduct and justify or excuse himself because in fact his passions

were aroused." ' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1215–1216, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1252.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, at p. 550.)

Absent evidence that " 'the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment' " (*People v. Barton* (1995) 12 Cal.4th 186, 201), heat of passion is inapplicable.

One who kills or attempts to kill another person because he or she actually, but unreasonably, believed in the need to defend him- or herself from imminent death or great bodily injury is deemed to have acted without malice. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) Under such an "unreasonable self-defense" theory, the crime committed is manslaughter or attempted manslaughter, not murder. (*Ibid*.)

b. The record does not support either sudden quarrel/heat of passion or unreasonable self-defense.

Both sudden quarrel/heat of passion and unreasonable self-defense require proof of the killer's subjective state of mind. Here, viewing the evidence in the light most favorable to defendant, the only evidence potentially reflecting Perez's subjective state of mind was that he and defendant had broken up and exchanged angry words throughout the day; he approached Villa and defendant from a concealed location while carrying a baseball bat; he said, "You should have told me"; he argued with Villa; Villa opened a folding knife and walked toward him; he began striking Villa's head with the bat; at some point after Perez

began beating Villa with the bat, Villa swung at Perez, then dropped his knife. This did not constitute substantial evidence that Perez's reason was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection. Nor was it substantial evidence Perez actually believed he needed to beat Villa on the head with the baseball bat to defend against imminent death or great bodily.

With respect to sudden quarrel/heat of passion, defendant confusingly argues, "The entire[t]y of the 'provocation' which occurred before any deadly blows were struck consisted not merely of Villa's oral challenge, but also of Whether [*sic*] or not such a challenge and mutual combat was sufficient to cause appellants [*sic*] to act from heat of passion instead of deliberation . . . ." The only "oral challenge" reflected in the record occurred about two months before Villa was killed when defendant took Perez with her to Villa's house. " '[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter—"the assailant must act under the smart of that sudden quarrel or heat of passion." ' " (*Beltran*, *supra*, 56 Cal.4th at p. 951.) As for "mutual combat," the record reflects Perez repeatedly struck Villa with the bat before Villa swung at Perez with the knife.

With respect to unreasonable self-defense, defendant argues, "Villa was the initial aggressor who first initiated the use of force by pulling out of [*sic*] knife and advancing on Perez." Defendant fails to note, however, that Perez brought a bat with him from his car when he approached Villa and defendant from a concealed location. Given that defendant saw the bat immediately, it is reasonable to infer that Villa did too. Perez also struck Villa with the bat repeatedly before Villa ever swung

the knife toward Perez. Under the circumstances, Villa's conduct of opening his knife and walking toward Perez without thrusting the knife toward Perez does not constitute substantial evidence of Perez's subjective belief in the need to defend himself from imminent death or great bodily injury.

Accordingly, the court was not required to instruct on voluntary manslaughter, as there was insufficient evidence to support either a sudden quarrel/heat of passion theory or an unreasonable self-defense theory.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.